No. 12-50377

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PLANNED PARENTHOOD OF AUSTIN FAMILY PLANNING, INC., PLANNED PARENTHOOD ASSOCIATION OF HIDALGO COUNTY TEXAS, INC., PLANNED PARENTHOOD ASSOCIATION OF LUBBOCK, INC., PLANNED PARENTHOOD OF CAMERON AND WILLACY COUNTIES, FAMILY PLANNING ASSOCIATES OF SAN ANTONIO, PLANNED PARENTHOOD OF CENTRAL TEXAS, PLANNED PARENTHOOD GULF COAST, INC., PLANNED PARENTHOOD OF NORTH TEXAS, INC., and PLANNED PARENTHOOD OF WEST TEXAS, INC.,
Plaintiffs-Appellees,

v.

THOMAS M. SUEHS, Executive Commissioner, Texas Health and Human Services Commission, in his official capacity,
Defendant-Appellant.

On Appeal from the United States District Court for the
Western District of Texas, Austin Division
Case No. 1:12-cv-322-LY

OPPOSITION TO EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL AND MOTION TO LIFT STAY

Helene T. Krasnoff
Planned Parenthood Fed. of America
1110 Vermont Avenue, NW, Ste. 300
Washington, DC 20005
(202) 973-4800

Roger K. Evans
Planned Parenthood Fed. of America
434 W. 33rd Street
New York, NY 10001
(212) 541-7800

P.M. Schenkkan
Matthew B. Baumgartner
Graves, Dougherty, Hearon & Moody, PC
401 Congress Avenue, Ste. 2200
Austin, Texas 78701
(512) 480-5673

Attorneys for Plaintiffs-Appellees

May 1, 2012

CERTIFICATE OF INTERESTED PERSONS

Planned Parenthood of Austin Family Planning, Inc., et al. v. Suehs,

No. 12-50377

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

- **Planned Parenthood of Austin Family Planning, Inc.** – Plaintiff;
- **Planned Parenthood Association of Hidalgo County Texas, Inc.** – Plaintiff;
- **Planned Parenthood Association of Lubbock, Inc.** – Plaintiff;
- **Planned Parenthood of Cameron and Willacy Counties** – Plaintiff;
- **Family Planning Associates of San Antonio** – Plaintiff;
- **Planned Parenthood of Central Texas** – Plaintiff;
- **Planned Parenthood Gulf Coast, Inc.** – Plaintiff;
- **Planned Parenthood of North Texas, Inc.** – Plaintiff;
- **Planned Parenthood of West Texas, Inc.** – Plaintiff;
- **Planned Parenthood Trust of South Texas** – Parent corporation of Plaintiff Family Planning Associates of San Antonio;
- **Planned Parenthood of Texas Capital Region** – Management corporation of Plaintiff Planned Parenthood of Central Texas;
- **Carrie Y. Flaxman**, **Helene T. Krasnoff**, **Roger K. Evans**, Planned Parenthood Federation of America – counsel for Plaintiffs;
- **P.M. Schenkkan**, **Susan G. Conway**, **Matthew B. Baumgartner**, GRAVES DOUGHERTY HEARON & MOODY, PC – counsel for Plaintiffs;
- **Thomas M. Suehs**, Executive Commissioner, Texas Health and Human Services Commission, in his Official Capacity – Defendant;
- **Jonathan F. Mitchell**, **Arthur C. D'Andrea**, OFFICE OF THE ATTORNEY GENERAL – counsel for Defendant.

/s/ Helene T. Krasnoff
Helene T. Krasnoff
Attorney for Plaintiffs-Appellees

INTRODUCTION AND RESPONSE TO THE "NATURE OF THE EMERGENCY"

As set forth in the Argument below, Defendant-Appellant Texas Health and Human Services Commission's ("HHSC") motion should be denied and the stay entered last night vacated. Under a long and uninterrupted line of precedent, Plaintiffs-Appellees ("Plaintiffs" or "Planned Parenthood") – not HHSC – are certain to prevail on their unconstitutional conditions claims. Further, Plaintiffs – not HHSC – will suffer irreparable injury, as will tens of thousands of low-income women, thus harming the public interest, if the District Court's order is stayed.

Before turning to those arguments, Plaintiffs are compelled to respond to the two assertions set forth as the "Nature of the Emergency" at the outset of HHSC's motion. Both assertions are serious distortions of the facts and law. First, there is nothing in state law that mandates, if the preliminary injunction stands, that Texas close down the Women's Health Program ("WHP"). To the contrary, the law and the history of WHP make abundantly clear that WHP should and must continue to operate. Second, Plaintiffs did not delay in filing this litigation. They filed just over one month after their federal constitutional claims became ripe.

A. THE PRELIMINARY INJUNCTION DOES NOT REQUIRE HHSC TO END WHP

WHP was originally authorized by the Texas Legislature in 2005 and has been operating since January 1, 2007. That authorization, which expired on

December 31, 2011, was renewed by the Texas Legislature in 2011, to extend WHP for an additional five years. The prohibition on participation in WHP by entities that provide or promote abortions or are affiliated with entities that provide or promote abortion was set forth in the original (2005) authorizing legislation in essentially the same language as the more recent renewal. C*ompare* Tex. Hum. Res. Code § 32.0248(h) *with* Tex. Hum. Res. Code § 32.024(c-1).

HHSC previously took the proper position that the WHP statutes could not be constitutionally construed or applied to exclude Plaintiffs. *See* Letter from A. Hawkins to Sen. Deuell (Feb. 4, 2009), Emergency Motion Appendix ("App."), 195-98. Thus, for more than five years, Plaintiffs have been WHP participants subject to the administrative requirement that they remain legally and financially separate from any entity that provides abortions. *See* Complaint, App. 28-45, 29.[1] Indeed, Plaintiffs have been critical to WHP's success, providing approximately 40% of WHP services statewide. The District Court's preliminary injunction does no more than maintain the status quo, protecting women's access to these services. If HHSC were correct that the statutes require it to shut down WHP, it would have been required to do so more than five years ago.

[1] Notably, up until now, HHSC implemented the statutes consistent with its understanding of the long line of precedent, including *Planned Parenthood of Houston and Southeast Texas v. Sanchez*, 403 F.3d 324 (5th Cir. 2005), upon which Plaintiffs and the District Court rely.

Moreover, HHSC's rule at issue here, 1 Tex. Admin. Code §§ 354.1361-64 ("Rule"), is not a faithful implementation of the statutes. In addition to the prohibition on HHSC's contracting with affiliates of entities that "promote" or provide abortions, the Legislature directed HHSC to implement WHP so as to obtain all benefits authorized under federal law. *See* Tex. Hum. Res. Code § 32.001.[2] Yet, even though HHSC was advised by the federal Department of Health and Human Services ("HHS") that if the Rule were implemented, HHS would end all federal financial participation in WHP, *see* Letter from C. Mann to B. Millwee (Dec. 12, 2011), App. 203-04, HHSC plunged forward and promulgated the Rule. And, as it had warned, HHS then advised HHSC that it would phase out federal financing of WHP. *See* Letter from C. Mann to B. Millwee (Mar. 15, 2012), App. 206-07.

Thus, not only is it clear from history that the statutes do not require that WHP end if Plaintiffs participate, but the Rule is also contrary to legislative intent in that it has cost Texas federal financial support for WHP.[3]

---

[2] *See also id.* § 32.024(e) ("The Department may not authorize the provision of any service to any person under the program unless federal matching funds are available."); *Id.* § 32.0248(a) (WHP is to be "through the medical assistance program"); *Id.* § 32.002(b) ("If a provision of this chapter conflicts with a provision of the Social Security Act … and renders the state program out of conformity with federal law to the extent that federal matching money is not available to the state, the conflicting provision of state law shall be inoperative.").

[3] Indeed, proposed 2011 legislation that would have shut down WHP if the prohibition on contracting with affiliates of abortion providers was enjoined were

Finally, the May 1 date for disqualifying Plaintiffs is completely arbitrary and of HHSC's own creation. The statutes do not require implementation of a new rule that changes the status quo of the past five years, let alone by a certain date. Indeed, even though the final Rule was promulgated on February 23, 2012, and was to take effect on March 14, 2012, HHSC on its own initiative established a deadline of April 30 as the date after which Plaintiffs would no longer be eligible.

Thus, HHSC's claim that the preliminary injunction "forces Texas to choose between contravening state law and shutting down the program," Emergency Mot. to Stay Prelim. Inj. Pending Appeal ("Stay Mot.") at ii, is complete fiction.

B. PLAINTIFFS DID NOT DELAY IN FILING THIS LITIGATION

While it is true that Plaintiffs have been aware of the legislation reauthorizing WHP for months, Stay Mot. at ii, that fact is irrelevant, and the State's argument that Plaintiffs delayed is misleading. As set forth above, the 2011 statute was essentially the same as the 2005 statute and, under that language, Plaintiffs had been full participants in WHP. There was no reason then, when the legislation was enacted, to know that HHSC would change its existing interpretation of the statute and would promulgate a new rule – nor how extreme that rule would be.

---

not adopted. *See, e.g.*, Committee Substitute for S.B. 1854, 82nd Leg., Reg. Sess. (Tex. 2011) ("The department shall cease the operation of the program if a court

There are three relevant dates. The first is February 23, 2012, when HHSC adopted the Rule. However, because of HHS's letter advising HHSC that if it adopted the Rule, HHS would withdraw federal participation (90% of the funding for WHP services), it appeared that there would be no WHP as of March 30, 2012, and thus Plaintiffs would have no justiciable claim that they were being unconstitutionally excluded from WHP on April 30, 2012.

The second relevant date is March 8, 2012, when Governor Perry announced that even if HHS would not renew federal funding, Texas would continue WHP using only state funds. Letter from Gov. Perry to T. Suehs, App. 209-10. The third is March 15, 2012, when HHS notified HHSC that it would allow a federally-funded transition period of up to nine months. Letter from C. Mann to B. Millwee, App. 206-07. These showed that WHP was likely to continue and that Plaintiffs then had a justiciable controversy over their exclusion. Plaintiffs filed this litigation on April 11, 2012, essentially one month later, and three weeks before the Rule would have the effect of excluding Plaintiffs from WHP.

Thus, as with HHSC's assertion of "no choice" but to shut down WHP, its assertion that Plaintiffs' "litigation strategy," Stay Mot. at iii., has caused HHSC's fabricated emergency is also false.

---

holds that [the ban on contracting] or its application to any person or entity is invalid or enjoins its enforcement.").

ARGUMENT

I. HHSC HAS NOT SHOWN THAT AN EMERGENCY STAY IS WARRANTED

Stay pending appeal is an "extraordinary remedy." *Belcher v. Birmingham Trust Nat'l Bank*, 395 F.2d 685, 685 (5th Cir. 1968) (denying stay pending appeal); *Greene v. Fair*, 314 F.2d 200, 202 (5th Cir. 1963) (denying motion for stay because it should be granted "in exceptional cases," and only where there "is great likelihood, approaching near certainty, that [the moving party] will prevail when [the] case finally comes to be heard on the merits.").

To prevail on its motion, HHSC must show: (1) a likelihood of prevailing on the merits on appeal; (2) that it is likely to suffer irreparable injury from the denial of the stay; (3) that Plaintiffs will not be substantially harmed; and (4) that granting the stay will serve the public interest. *See Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992); *Coastal States Gas Corp. v. Dep't of Energy*, 609 F.2d 736, 737 (5th Cir. 1979) (same). HHSC has the burden of establishing each of these prerequisites. *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982). As demonstrated below, it cannot do that here.

A. The District Court Considered And Correctly Denied HHSC's Claim That It Will Likely Prevail On The Merits

There is no dispute that, as the District Court found, the Rule requires WHP providers to relinquish constitutionally protected conduct in which they engage

outside of the program and with separate funds as a condition of participating in WHP. In particular, Plaintiffs must relinquish their First Amendment rights to advocate for a woman's right to choose and to associate with those who engage in that advocacy, provide abortions, and/or advertise abortions. Order Granting Prelim. Inj. ("PI Order") at 13, App. 15 ("The rights to free speech and association are fundamental rights safeguarded by the First Amendment from invasion by the states. By advocating for women's access to safe and legal abortion and associating with entities providing such services, Plaintiffs are exercising these fundamental rights.") (internal citation omitted).

HHSC claims, however, that it may require Planned Parenthood to relinquish these constitutionally protected activities so long as its ban is "germane" or "related to the benefit that the State seeks to confer." Stay Mot. at 11. In its preliminary injunction briefing and at oral argument, HHSC made the exact same argument and drew the District Court's attention to the same "numerous decisions of the Supreme Court," *id.* at 1-2, on which it attempts to rely here. The District Court properly rejected HHSC's argument, holding that:

> The Commissioner presents the court with no relevant support for his primary legal argument in support of the challenged rule: that a state may condition participation in a government program on account of constitutionally protected conduct, even if the conduct occurs outside the scope of the federally funded program, so long as the condition is germane to the purposes of the benefits conferred.

PI Order at 16, App. 18. That is because HHSC's "germaneness argument does not appear in the Supreme Court's unconstitutional conditions cases." *Id.*[4]

The analogous cases date back more than 40 years and unequivocally hold that government cannot restrict eligibility for a government program "on a basis that infringes on constitutionally protected liberty":

> [E]ven though a person has no 'right' to a valuable governmental benefit … [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person *because of his constitutionally protected speech or associations*, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)) (emphasis added) (second alteration in original).

Thus, Texas need not fund abortion advocacy, advertising, or services,[5] but it may not disqualify an otherwise eligible recipient of public funds based on its

[4] Even if "germaneness" were relevant, which it is not, there is zero evidence in the record to support HHSC's political rhetoric that Planned Parenthood's "mission and philosophy is fundamentally inconsistent with the goals of [WHP]." Stay Mot. at 13. Indeed, the record is replete with evidence to the contrary. *See, e.g.*, Lambrecht Decl. ¶¶3-5, App. 213-14; Gonzales Decl. ¶¶3-6, App. 220; Haskell Decl. ¶¶3-6, App. 226; Hildebrand Decl. ¶¶3-5, App. 232-33.

[5] Indeed, WHP does not subsidize Plaintiffs' constitutionally protected conduct. While HHSC baldly asserts that Plaintiffs provide no "assurance" that the WHP funds do not subsidize abortion-related activities, the record is clear to the contrary. Plaintiffs are routinely audited by the State to ensure that no government funds are used to subsidize abortion care. PI Order at 4, n.3, App. 6. To counter

constitutionally protected conduct outside of the government program. This was explained in *Rust v. Sullivan*, 500 U.S. 173, 197-98 (1991), which involved now-repealed federal regulations that restricted recipients of certain family planning funds from providing information about abortion within the government-subsidized project. The regulations, however, did not disqualify entities if such information was provided outside of the subsidized project. The Court upheld the regulations because:

> [H]ere the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. ... In contrast, our 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.

Id. at 196-97. As the district court noted, HHSC's "germaneness argument . . . is notably absent from *Rust*." PI Order at 16, App. 18.[6]

---

this fact (and continue its far-ranging wanderings into unrelated jurisprudence in search of helpful language), HHSC cites *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), for the proposition that this does not matter because money is "fungible." Stay Mot. at 14. Putting aside that this extreme view has been rejected in all of the relevant cases, it is clear that, both as a factual and legal matter, *Holder* is different. *See, e.g.*, *Holder*, 130 S. Ct. at 2724 (government interest in combating terrorism is "urgent objective of the highest order"); *id.* at 2725-26 (foreign terrorist organizations do not maintain "'legitimate financial firewalls'") (citation and emphasis omitted).

[6] HHSC's contention that "*Rust* establishes that a law designed to ensure that taxpayer funds are spent for their designated purposes *will always prevail* over an unconstitutional-conditions challenge" is in no way supported by that decision.

The Supreme Court has repeatedly recognized this critical distinction between limitations on the use of government funds (which are permissible) and regulations that condition receipt of funds on the recipient forgoing constitutionally protected conduct outside of the funded project (which are impermissible). In *Rust*, it was critical that the recipients of the funds remained able to engage in abortion-related activities so long as they did so with adequate separation:

> The regulations govern the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities. The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; *it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds*.

500 U.S. at 196 (final emphasis added). Similarly, in *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364 (1984), the Supreme Court held unconstitutional a law that barred entities that editorialized "on controversial issues" of "public importance," *id.* at 384, from receiving federal funds for non-editorial programming and noted that if the law allowed stations "to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid." *Id.* at 400.[7]

Stay Mot. at 9 (emphasis added). To the contrary, the Court held that only because the regulations allowed the grantee to "engage in abortion-related activity separately from activity receiving federal funding," 500 U.S. at 198, did they not run afoul of the Court's unconstitutional conditions precedent.

[7] *See also Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 544 (1983) (constitutionally permissible to prohibit charitable organizations from using

Appellate courts, including this one, have also recognized this balance, which is constitutionally required to protect liberties while allowing government to ensure that its funds are spent for the purposes for which it intends, in situations that each involved abortion providers participating in government programs. *See Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 341 (5th Cir. 2005) (noting that if the family planning funding restriction did not allow for affiliates, it would be unlike the regulations upheld in *Rust* because "it would require that entities not engage in abortion activities even with private funds"); *Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Dempsey*, 167 F.3d 458, 463 (8th Cir. 1999) (construing statute to allow affiliates of abortion providers to participate in family planning program because a contrary construction "would cross the line established in *Rust*, *League of Women Voters*, and *Regan*, and hence be an unconstitutional condition"); *Planned Parenthood of Cent. & N. Ariz. v. Arizona*, 718 F.2d 938, 942-44 (9th Cir. 1983), *appeal after remand*, 789 F.2d 1348 (9th Cir. 1986), *summarily aff'd sub nom Babbit v. Planned Parenthood of Cent. and N. Ariz.*, 479 U.S. 925 (1986); *see also Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219 (2d Cir. 2006), *cert. denied sub nom Legal Serv.*

---

tax-deductible contributions to support lobbying efforts, where they can establish separate affiliates to use non-tax-deductible contributions for such efforts); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (upholding the use of subjective criteria for arts grants, but noting that "[i]f the NEA were to leverage its

for New York City v. Legal Servs. Corp., 552 U.S. 810 (2007) (applying relevant unconstitutional conditions cases to restrictions on legal services providers).[8]

Indeed, not a single federal court has upheld a restriction like the Rule that conditions eligibility in a public health program on a provider's relinquishing its constitutionally protected conduct related to abortion that it conducts through legally and financially separate affiliates. In the face of this precedent, HHSC invents its novel theory of unconstitutional conditions law using cases that, as the District Court explained, are not "relevant or instructive." PI Order at 17, App. 19. A review of the contexts of those cases shows how far afield HHSC has to reach:

- *South Dakota v. Dole*, 483 U.S. 219 (1987), as the District Court recognized "does no more than establish that Congress may, incident to the Spending Clause, attach conditions to states' receipt of federal funds." PI Order at 17, App. 19.

- *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), *U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973) and *Garcetti v. Ceballos*, 547 U.S. 410 (2006), as the District Court explained, all arose

---

power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case").

[8] Moreover, in the past year alone, three federal district courts (in addition to the one here) have preliminarily enjoined state action aimed at removing Planned Parenthood entities from eligibility for government funding based on their provision of, advocacy for access to, and/or association with abortion, recognizing that each Planned Parenthood plaintiff was likely to prevail on its claim that such action imposed an unconstitutional condition. *See Planned Parenthood Greater Memphis Region v. Dreyzehner*, 2012 WL 529811, at *8 (M.D. Tenn. Feb 17, 2012); *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482, 492-95 (M.D.N.C. 2011); *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1234 (D. Kan. 2011).

"in the unique context of public employment, where the Supreme Court has found that, in the interest of the effective administration and integrity of government," the government may impose limits. PI Order at 17, App. 19. Of course, Plaintiffs here are not government employees.

- *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010), and *Locke v. Davey*, 540 U.S. 712 (2004), are not unconstitutional conditions cases at all. In *CLS*, the Court reviewed a law school policy that the plaintiffs claimed violated their First Amendment rights and found that it was a reasonable, viewpoint-neutral condition on access to a limited public forum. In *Locke*, the Court considered whether a policy that prohibited certain scholarships from being used for theology degrees for any religion violated the Free Exercise Clause and found it did not.

- *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), both involve land use restrictions. And while they do not involve a claim like Plaintiffs', they *support* Plaintiffs' position. In both cases, the Court ruled in favor of the land owner, recognizing that the government could not impose as a condition of a land use permit something it could not command directly.

Seven years ago, this Court considered a different Texas law restricting abortion providers' participation in a different family planning program. This Court, like the District Court, had no trouble finding the right cases to apply. It looked to *Rust* and *Regan* to support its decision to construe the state statute as allowing the creation of independent affiliates, and thus avoid constitutional problems. *Sanchez*, 403 F.3d at 340-41. As explained above, every other court to consider a restriction like the Rule has followed the same constitutional analysis, and held that government may not disqualify an entity from participating in a government program when it engages in protected conduct in affiliated entities that

are legally and financially separate from the government-funded program.[9] The District Court, therefore, properly concluded that Plaintiffs – and not HHSC – are likely to succeed on their claim that the Rule imposes an unconstitutional condition in violation of the First Amendment.

B. HHSC Will Not Be Irreparably Harmed By Running WHP As It Has Since Its Inception

HHSC claims that it is irreparably injured by the preliminary injunction because it "prevent[s] the State from enforcing a statute duly enacted by the Texas Legislature." Stay Mot. at 16. As discussed in the Introduction, *supra*, the Texas statutes do not require the Rule. HHSC implemented essentially identical statutory language for years under requirements that allowed Plaintiffs to participate in WHP. Moreover, as is explained in the Introduction, HHSC's insistence on the Rule is contrary to several relevant statutory directives concerning WHP.

Neither HHSC nor the State of Texas is harmed in any way by the preliminary injunction. The injunction does not impose any costs on HHSC and merely maintains the status quo, with WHP operating as it has since its inception and without any disruption to the more than 103,000 Texas women who depend on

[9] HHSC also complains that some of the Plaintiffs advocate for a woman's right to choose (which it deems "promotion" of abortion) through the same entity that receives WHP funds. *See* Stay Mot. at 10. The Rule not only bars Plaintiffs from engaging in that advocacy; it bars them from affiliating with a legally and financially separate entity that engages in that advocacy in violation of extensive

it for preventive health services. In fact, the injunction will have at least two important *benefits* to the State. First, it will allow WHP to continue to be funded 90% by the federal government, which HHS has stated it is willing to do so long as the Rule is not enforced. Second, maintaining access to all WHP providers will reduce the State's healthcare costs because the services available through WHP save money. *See* Rider 64 Rpt., App. 179-93 (in 2009, WHP saved more than $46 million by preventing pregnancies that would have resulted in Medicaid-covered births; the State's savings, after WHP expenditures, was almost $20 million).

C. The District Court Correctly Ruled That Enforcement Of The Rule Will Cause Immediate And Irreparable Harm To Plaintiffs

In contrast to HHSC, as the District Court ruled, Plaintiffs face "a substantial threat of irreparable injury" without a preliminary injunction. PI Order at 19, App. 21. First, as demonstrated above, the Rule violates Plaintiffs' constitutional rights, which itself constitutes irreparable harm. *See, e.g.*, *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) ("Loss of First Amendment freedoms, even for minimal periods of time, constitute irreparable injury." (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976))). Moreover, HHSC is wrong that staying the District Court's order will cause Plaintiffs only monetary harm. Plaintiffs provided ample, undisputed testimony to support the District Court's findings that the loss of

---

precedent. It is the complete prohibition on engaging in these protected activities through an affiliate that is unconstitutional.

WHP funding will irreparably harm their operations because it will force them to reduce services, lay off staff, and/or close clinics, and that once they take these actions, it will not be possible for them to resume operations as they are today. *Id.* at 19-20.[10] However, even if Plaintiffs' injuries were only monetary, they would be irreparable here because Plaintiffs cannot later recover damages from HHSC due to the Eleventh Amendment. *See, e.g., Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010); *see also Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 473 (5th Cir. 1985) ("The absence of an available remedy by which the movant can later recover monetary damages …. may also be sufficient to show irreparable injury.").

Courts have repeatedly held that these very injuries constitute irreparable harm. *See, e.g., Planned Parenthood of Kan. & Mid-Mo.*, 799 F. Supp. 2d at 1235 (finding irreparable injury where "[i]n the absence of [government] funding, Planned Parenthood will be required to either increase its charges to clients, fire employees, close one or more of its health centers, or engage in some combination of these responses"); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State*

[10] Indeed, the loss of WHP funding does threaten Plaintiffs' "financial viability." Stay Mot. at 17. For example, WHP funding is nearly 50% of the budget of Planned Parenthood Association of Hidalgo County and without a preliminary injunction, it will be forced to lay off 15 to 35 staff members and close two of its three health centers. PI Order at 20, App. 22. Planned Parenthood of West Texas will lose 40% of its revenue, and Planned Parenthood of Lubbock will lose 60%, making it nearly impossible to continue operation of its one health center. *Id.*

Dep't of Health, 794 F. Supp. 2d 892, 912-913 (S.D. Ind. 2011) (Planned Parenthood would be irreparably harmed by funding restriction because it would have to close clinics, make layoffs, and cease providing Medicaid services, causing "thousands of patients [to] lose their healthcare provider of choice"); *see also Planned Parenthood of Cent. Tex. v. Sanchez*, 280 F. Supp. 2d 590, 610 (W.D. Tex. 2003), *rev'd and remanded on other grounds*, *Sanchez*, 403 F.3d 324.[11]

D. The District Court Correctly Found That Maintaining Women's Access to Preventive Health Services Is In The Public Interest

HHSC claims the public interest supports a stay because it will allow HHSC to "carry out the statutory policy of the Legislature." Stay Mot. at 18. As discussed in the Introduction, *supra*, the Texas statutes do not require the Rule that the District Court preliminarily enjoined and indeed, the Rule is contrary to a variety of legislative directives regarding WHP. Moreover, the public interest is not served by enforcing a Rule that is likely unconstitutional. *See, e.g.*, *Ingebretsen*, 88 F.3d at 280 (finding that public interest is not disserved by injunction preventing implementation of law held likely unconstitutional); *Florida Businessmen for Free Enterprise v. City of Hollywood*, 648 F.2d 956, 959 (5th Cir.

[11] HHSC's suggestion based on a news article, that because nationally Planned Parenthood raised several million dollars following the Komen controversy earlier this year, Plaintiffs can "recoup[]" the annual loss of more than $13 million in WHP funds through private donations conflicts directly with the actual evidence in this case, which is that private donations could never make up for the loss of WHP funds. *See* Lambrecht Decl. ¶13, App. 216; Gonzales Decl. ¶9, App. 221-22.

1981) ("The public interest does not support the city's expenditure of time, money, and effort in attempting to enforce an ordinance that may well be held unconstitutional.").

Most importantly, however, the stay cannot be in the public interest because as the District Court ruled, it would harm tens of thousands of low-income women who rely on Plaintiffs for basic, preventive health care. *See* PI Order at 4, App. 6 ("[A]t least 49% of the approximately 103,000 women who obtained services through the program in 2010 obtained some services at a Planned Parenthood provider. These women represent a population that, without the Women's Health Program, would likely be unable to obtain health care."). As the District Court explained, without Plaintiffs in WHP, Texas will be unable "to find substitute providers for these women in the immediate future," creating "the potential for immediate loss of access to necessary medical services by several thousand Texas women." *Id.* at 22, App. 24. Moreover, "[i]f Plaintiffs are forced to close some health centers or to reduce their centers' hours, the tens of thousands of additional clients they serve will also be harmed." *Id.* at 21, App. 23. Thus, the District Court properly ruled that "the public interest is best served by allowing Plaintiffs to continue to receive government funds to provide family-planning services to women throughout Texas while this case is pending." *Id.* at 22, App. 24.

II. THE DISTRICT COURT'S REQUIREMENT OF NO BOND DOES NOT WARRANT A STAY

HHSC mistakenly claims that the District Court's preliminary injunction order should be stayed because it ruled that Plaintiffs were not required to post a bond pursuant to Fed. R. Civ. P. 65(c). *See* PI Order at 23, App. 25. This argument is waived, however, because HHSC never argued to the district court that a bond was required in this case. *See Lofton v. McNeil Consumer & Specialty Pharms.*, 672 F.3d 372, 381 (5th Cir. 2012) (noting Court's "'virtually universal practice of refusing to address matters raised for the first time on appeal'" (citation omitted)); *Flood v. Clearone Commc'ns*, 618 F.3d 1110, 1126 n.4 (10th Cir. 2010) (when defendant "failed to bring the bond issue to the district court's attention," it "forfeited the argument").

Moreover, this Court has made clear that the amount of security pursuant to Rule 65(c) "is a matter for the discretion of the trial court," and the court "may elect to require no security at all." *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996) (*citing Corrigan Dispatch Co. v. Casa Guzman, S.A.*, 569 F.2d 300, 303 (5th Cir. 1978)) (upholding district court injunction that did not require posting of bond). Here, the district court properly exercised its discretion. Rule 65(c) allows the district court to require a bond "in an amount that the court considers proper" in order to "pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). If this

Court's stay is lifted and the district court's preliminary injunction is in effect, HHSC will not sustain any "costs or damages" at all should the injunction later be held improper. Plaintiffs will receive funds only as reimbursement for services actually provided to WHP patients. HHSC intends to expend those funds whether Plaintiffs provide those services, or another WHP provider does.[12] Under these circumstances, the district court properly exercised its discretion to rule that no bond is required.[13]

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully submit that this Court should vacate the stay entered last night and deny HHSC's motion.

Respectfully submitted,

/s/ Helene T. Krasnoff
Helene T. Krasnoff
Attorney for Plaintiffs-Appellees

[12] Indeed, if HHSC could recover funds from Plaintiffs after Plaintiffs provided care to WHP patients, it would be unjustly enriched, as WHP patients will receive care without HHSC actually reimbursing the provider of the service.

[13] The cases cited by HHSC are not to the contrary, as the defendants in those cases would actually suffer damages in the event that the injunction was improperly entered. For example, in *Nichols v. Alcatel USA Inc*, 532 F.3d 364 (5th Cir. 2008), this Court upheld the district court's denial of an injunction where plaintiffs did not satisfy any of the four factors for an injunction. In discussing the balance of harms, this Court noted that the plaintiffs only offered to post a "modest bond" and that that bond would be insufficient to compensate the defendant for the damages it would suffer. In *Continuum Co., Inc. v. Incepts, Inc.*, 873 F.2d 801 (5th Cir. 1989), this Court addressed the proper amount of bond, where it was clear that defendants would suffer damages if the injunction was wrongfully issued.

CERTIFICATE OF SERVICE

I hereby certify that on the 1st of May, 2012, a copy of this Opposition to Emergency Motion to Stay Preliminary Injunction Pending Appeal and Motion to Lift Stay was served via the CM/ECF system to Defendant's counsel.

/s/ Helene T. Krasnoff
Helene T. Krasnoff
Attorney for Plaintiffs-Appellees